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Portcullis International Ltd & Ors v George Pathmanathan a/l Michael Gandhi Nathan and another appeal

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COURT OF APPEAL (PUTRAJAYA) — APPEAL NOS W-02(IM)-1721–10 OF 2014 AND W-02(IM)-1722–10 OF 2014
ALIZATUL KHAIR, NALLINI PATHMANATHAN AND PRASAD ABRAHAM JJCA
14 MARCH 2016

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Companies and Corporations — Shares — Valuation — Court ordered first appellant to sell its shares in third appellant to respondent — Appellants' application for stay pending appeal against order granted by court — Appeal against order dismissed — Respondent filed application to fix cut-off date for valuation of shares — Appellants sought declaration and payment of dividends to shareholders of third appellant for tenure of stay — Whether cut-off date fixed by trial judge should be altered — Whether shareholders entitled to dividends for tenure of stay

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The respondent, a shareholder of the third appellant had filed a petition against the appellants complaining that the first and second appellants had used the company's power for collateral purposes, and in doing so, they had prejudiced and neglected the respondent's interests. The High Court vide order dated 29 July 2011 ('the order') had granted the reliefs sought by the respondent, inter alia, that the first appellant was to sell all its shares in the third appellant to the respondent at net book value within 90 days from the date of the order. Stay of the order pending appeal was granted nevertheless, subsequently the appeal was dismissed by the Court of Appeal and the appellants' motion for stay was dismissed by the Federal Court. In the present case, at the trial stage, the respondent filed an application to fix cut-off date for the valuation of the shares belonging to the first appellant in the third appellant as of 29 July 2011 since no cut-off date was specified in the order. On the other hand, the appellants filed an application seeking a declaration and payment of dividends to the shareholders of the third appellant for the tenure of the stay. It must be noted that the first appellant had contributed substantially to the profits accumulated between the date of the stay and the hearing of the appeals which amounted to USD750,000. The learned judge fixed the cut-off date as 29 July 2011 but dismissed the appellant's application, hence the appellants filed the present appeals ie in relation to respondent's application (Appeal No W-02(IM)-1721–10 of 2014) and in relation to the appellant's application (Appeal No W-02(IM)-1722–10 of 2014). The appellants submitted that if the cut-off date for the valuation of the shares was 29 July 2011, it would amount to a failure to give cognisance to the work put in to maintain the

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business from 2011–2014. Thus, it was argued that the valuation date of the shares should be altered or dividends should be awarded to the shareholders. In response, the respondent contended that the allocation of dividends should be maintained pursuant to the order as anything otherwise would amount to a variation of that order.

Held, dismissing Appeal No W-02(IM)-1721–10 of 2014 and allowing Appeal No W-02(IM)-1722–10 of 2014:

(1) Based on the submissions of the parties and the appeal records, the court was not convinced that the cut-off date for the valuation of the shares should be altered. The court concurred with the learned judge that the correct cut-off date for the valuation of the shares was 29 July 2011 (see para 19).

(2) The effect of the stay of the execution was to suspend the High Court order of 29 July 2011–23 January 2014. It was not disputed that during that time frame, profits of USD750,000 were accumulated. Thus, the shareholders of the company were entitled to be paid dividends until the date of the transfer of shares (see para 21).

[Bahasa Malaysia summary

Responden, pemegang saham perayu ketiga telah memfailkan petisyen terhadap perayu-perayu mengadu bahawa perayu pertama dan kedua telah menggunakan kuasa syarikat untuk tujuan kolateral, dan dalam berbuat demikian, mereka telah memprejudis dan mengabaikan kepentingan responden. Mahkamah Tinggi melalui perintah bertarikh 29 Julai 2011 ('perintah') telah membenarkan relif-relif yang dipohon oleh responden, antara lain, bahawa perayu pertama adalah dihendakki menjual kesemua sahamnya di dalam perayu ketiga kepada responden pada nilai buku dalam masa 90 hari dari tarikh perintah tersebut. Penangguhan perintah sementara menunggu rayuan dibernarkan walau bagaimanapun, kemudiannya rayuan telah ditolak oleh Mahkamah Rayuan dan usul perayu-perayu untuk penangguhan ditolak oleh Mahkamah Persekutuan. Dalam kes ini, pada peringkat perbicaraan, responden memfailkan permohonan untuk menetapkan tarikh potong bagi penilaian saham-saham yang dimiliki oleh perayu pertama di dalam perayu ketiga semenjak 29 Julai 2011 memandangkan tarikh potong dinyatakan di dalam perintah tersebut. Sebaliknya, perayu-perayu memfailkan permohonan memohon perisytiharan dan bayaran dividen kepada pemegang-pemegang saham perayu ketiga bagi tempoh penangguhan. Ia perlu diambil perhatian bahawa perayu pertama telah menyumbang secara substansial kepada keuntungan yang terkumpul di antara tarikh penangguhan dan pendengaran rayuan-rayuan yang berjumlah kepada USD750,000. Hakim yang bijaksana menetapkan tarikh potong sebagai 29 Julai 2011 tetapi menolak permohonan perayu, maka perayu-perayu memfailkan rayuan-rayuan ini iaitu berkaitan kepada permohonan responden (Rayuan No W-02(IM)-1721–10 Tahun

2014) dan berkaitan kepada permohonan perayu (Rayuan No W-02(IM)-1722–10 Tahun 2014). Perayu-perayu berhujah bahawa jika tarikh potong bagi penilaian saham-saham adalah 29 Julai 2011, ia akan merupakan kegagalan untuk memberi perhatian kepada kerja yang dijalankan untuk mengekalkan perniagaan dari tahun 2011–2014. Oleh itu, ia dihujahkan bahawa tarikh penilaian saham-saham patut diubah atau dividen patut diawardkan kepada pemegang-pemegang saham. Dalam menjawab, responden berhujah bahawa peruntukan dividen patut dikekalkan berikutan perintah tersebut jika tidak akan merupakan variasi perintah tersebut.

Diputuskan, menolak Rayuan No W-02(IM)-1721–10 Tahun 2014 dan membenarkan Rayuan No W-02(IM)-1722–10 Tahun 2014:

(1) Berdasarkan hujahan pihak-pihak dan rekod rayuan, mahkamah tidak yakin bahawa tarikh potong bagi penilaian saham-saham patut diubah. Mahkamah bersetuju dengan hakim yang bijaksana bahawa tarikh potong betul bagi penilaian saham-saham adalah 29 Julai 2011 (lihat perenggan 19).

(2) Kesan penangguhan pelaksanaan adalah untuk menggantung perintah Mahkamah Tinggi bertarikh 29 Julai 2011–23 Januari 2014. Ia tidak dipertikaikan bahawa semasa rangka masa tersebut, keuntungan sebanyak USD750,000 dikumpulkan. Oleh itu, pemegang-pemegang saham syarikat berhak dibayar dividen sehingga tarikh pemindahan saham-saham tersebut (lihat perenggan 21).]

Notes

For cases on valuation, see 3(1) *Mallal's Digest* (5th Ed, 2015) paras 1210–1218.

Legislation referred to

Companies Act 1965 s 181(1)(a)

Appeal from: Originating Petition No D3(2)-26–80 of 2006 (High Court, Kuala Lumpur)

David Morais (Anantha Krishan and Karyn Khoo with him) (Anantha Krishnan) for the appellants.
B Thangaraj (M Nalani with him) (Thangaraj & Assoc) for the respondent.

Nallini Pathmanathan JCA:

[1] The sole issue that arises for consideration in these appeals is the appropriate cut-off date for the valuation of shares pursuant to an order of the High Court to buy-out the shareholding of the first appellant, Portcullis International Ltd in the third appellant, Portcullis Holdings (M) Sdn Bhd.

[2] George Pathmanathan, the petitioner in the High Court and the respondent in the Court of Appeal, filed a petition pursuant to s 181(1)(a) of the Companies Act 1965 ('the CA') against Portcullis International Ltd, Chong Kok Kong and Portcullis Holdings (M) Sdn Bhd who are the first, second and third respondents respectively in the High Court and the appellants in the Court of Appeal.

[3] The parties will be referred to as they were in the appeals before us. Vide the petition George Pathmanathan a/l Michael Gandhi Nathan ('the respondent'), claimed that Portcullis International Ltd and Chong Kok Kong ('the first and second appellants') had used their position to oppress the rights of the respondent as a minority shareholder in Portcullis Holdings (M) Sdn Bhd ('the third appellant'). However, for the purposes of these two related appeals, we are only concerned with two applications which were heard together before the High Court.

[4] The first application was filed by the respondent. Although this application had various prayers, the appellants had no objections to most of the prayers save for prayer 1 which sought an order for a cut-off date to be fixed for the valuation of shares. The other application was filed by the appellants, seeking a declaration and payment of dividends to the shareholders of the third appellant based on accumulated profits.

[5] The salient facts are set out below.

THE PARTIES

[6] Portcullis Holdings (M) Sdn Bhd ('the third appellant') was incorporated on 27 October 1994 as an investment-holding company.

[7] The respondent holds 25% of the shares of the third appellant. The remainder 75% of the third appellant's shares is held by the second appellant, via the first appellant, ('the first appellant').

BACKGROUND FACTS

[8] The respondent filed this petition complaining that the first and second appellants had used the company's power for collateral purposes, and in doing so, they prejudiced and neglected the respondent's interests.

[9] After a full hearing of the oppression petition, the High Court granted the reliefs sought by the respondent (High Court order dated 29 July 2011). Among the prayers granted by the High Court was paragraph (3) which was an

order that the first appellant is to sell all its shares in the third appellant to the respondent at net book value within 90 days from the date of the order.

[10] A stay of the High Court order pending appeal was granted by the Court of Appeal on 21 September 2011. The Court of Appeal dismissed the respondent's appeal on 14 August 2013. The appellants filed a motion for stay in the Federal Court, but this was dismissed on 23 January 2014. The Federal Court dismissed the respondent's motion for leave to appeal on 29 January 2014.

[11] The respondent filed an application to, inter alia, fix the cut-off date for the valuation of the shares belonging to the first appellant in the third appellant as of 29 July 2011 ('the cut-off date'). This is because no cut-off date was specified in the order of court dated 29 July 2011. The appellants had no objections to this application, save for the fixing of the cut-off date.

[12] The appellants however filed an application seeking a declaration and payment of dividends to the shareholders of Portcullis Holdings (M) Sdn Bhd for the tenure of the stay.

THE HIGH COURT DECISION

[13] The learned High Court judge fixed the cut-off date as 29 July 2011 but dismissed the appellants' application for a distribution of the profits of the third appellant during the tenure of the stay.

[14] The High Court held that since it had made an order for share purchase and transfer in its decision dated 29 July 2011, that order must be complied with. If the application for a distribution of profits was allowed for the period of the stay, this would effectively amount to a variation of the order of 29 July 2011. Since the order dated 29 July 2011 had been perfected, the court had no power to alter or vary it. Therefore, the High Court dismissed the appellants' application.

[15] The appellants appealed against the High Court decision in respect of the decisions in both applications.

PARTIES' SUBMISSIONS ON ALLOCATION OF PROFITS DURING THE PERIOD OF STAY OF THE HIGH COURT ORDER

[16] The appellants contended that pursuant to the stay of the High Court order on 21 September 2011, the business of the subject companies had continued on as usual and considerable profits were accumulated. These profits had been secured by the shareholders as originally placed prior to the

oppression order handed down by the High Court. In other words, the first appellant had contributed substantially to the subject profits and sought to secure its share. It was not disputed that the profits accumulated between the date of the stay and the hearing of this appeal amounted to USD750,000.

[17] Briefly, it was argued for the appellants that if the cut-off date for the valuation of the shares was 29 July 2011, it would amount to a failure to give cognisance to the work put in to maintain the business from 2011–2014. Therefore, the appellants submitted that the valuation date of the shares should be altered or dividends should be awarded to the shareholders.

[18] For the respondent it was argued that there was no cross-petition on this issue. It was further contended that the allocation of dividends should be maintained in proportion to the new shareholding pursuant to the order of court dated 29 July 2011. Anything otherwise would amount to a variation of that order.

THE DECISION OF THE COURT OF APPEAL

Date for shares valuation

[19] Having heard parties and having perused the appeal records, we were not convinced that the cut-off date for the valuation of the shares should be altered. In short, we concurred with the learned judge that the correct cut-off date for the valuation of the shares was 29 July 2011.

Dividends

[20] We were of the view that the appellants are entitled to dividends beginning from the date of the High Court order from 29 July 2011 until the date of transfer of the shares. The effect of the stay was to 'stop' or 'freeze' the High Court order taking effect. This means that during the period of the stay pending appeal, matters proceeded as if the order of the High Court was not given effect. In other words, the shareholding of the first appellant would remain as it was prior to the High Court order dated 29 July 2011, for the entire period of the stay of execution. The distribution of profits should therefore reflect the shareholding at that time. With the lapse of the stay, and with the coming into effect of the new shareholding, the first appellant would no longer be entitled to such dividends.

[21] In summary, the effect of the stay of execution was to suspend the High Court order of 29 July 2011–23 January 2014. It is not disputed that during

A that time frame, profits of USD750,000 were accumulated. Therefore, the shareholders of the company are entitled to be paid dividends until the date of the transfer of shares.

CONCLUSION

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[22] We dismissed Appeal No W-02(IM)-1721–10 of 2014 so the cut-off date for valuation of the shares remains at 29 July 2011. However, we allowed Appeal No W-02(IM)-1722–10 of 2014 and granted an order that the appellants are entitled to dividends from 29 July 2011 until the date of transfer C of the shares from the appellants to the respondent.

[23] We ordered each party to bear their own costs. Deposits are refunded.

Appeal No W-02(IM)-1721-10 of 2014 dismissed; Appeal No D *W-02(IM)-1722-10 of 2014 allowed.*

Reported by Dzulqarnain Ab Fatar

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